United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

ORIGINAL

CA 76-7492

United States Court of Appeals
FOR THE SECOND CIRCUIT

DR. DAVID SIROTA, FRANCES NAISON, IDA SIROTA and JOHN P. LYCETTE, JR.,

Plaintiffs,

against

ECONO-CAR INTERNATIONAL, INC., WESTINGHOUSE ELECTRIC CORPORATION, JAMES W. CROWLEY, BERRIEN H. BECKS, and BERRIEN H. BECKS, WILLIAM FRANK O'ROURKE, and FLORIDA BANK AND TRUST COMPANY AT DAYTONA BEACH, as EXECUTORS OF THE ESTATE OF GUY B. ODUM.

Defendants.

JAMES W. CROWLEY and BERRIEN H. BECKS,

Third-Party Plaintiffs,

against

POWELL, GOLDSTEIN FRAZER & MURPHY, a partnership,

Third-Party Defendant.

ABRAHAM & CO. INC.,

Claimant-Appellant

against

SPINGARN & CO., INC., and SATNICK-JAPHA, INC.,

Claimants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR APPELLANT

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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JAMES W. CROWLEY and BERRIEN H. BECKS, Third-Party Plaintiffs, -against- POWELL, GOLDSTEIN FRAZER & MURPHY, a partnership Third-Party Defendant,	
ABRAHAM & CO. INC., Claimant-Appellant -against- SPINGARN & CO., INC., and SATNICK-JAPHA, INC., Claimants-Appellees	

REPLY BRIEF ON BEHALF OF
APPELLANT, ABRAHAM & CO. INC.

POINT I

THE SELL-OUT RULE WAS NOT AVAILABLE TO ABRAHAM

The decision of the court below was based upon an incorrect reading of Sections 1(b), 59, and 60 of the NASD Uniform Practice Code. In our principal brief, we demonstrated that Section 1(b) applies only to confirmed contracts, as evidenced by the references in Section 1(b) to Sections 59 or 60 as the remedy for a party not in default. Section 59 (the Buy-in rule) requires that the confirmation of the Seller to be bought-in be annexed to the Buy-in notice. Section 60 (the Sell-out rule) requires as a condition precedent to its utilization that the selling broker not have received from the buyer a properly executed NASD Reclamation or Rejection Form #801.

Since both Spingarn and Satnick DKed the trade, followed by a rejection on Form #801 by Satnick, the Sell-out prodedure was not available. Cross Claimants tacitly acknowledge the unavailability to Abraham of the Sell-out rule, contenting themselves with the meaningless assertion (Brief, p. 10) that "Regardless of the availability of this remedy to Abraham, it chose not to pursue it". Having acknowledged that Abraham could not utilize the Sell-out rule, Cross Claimants have, in affect, conceded the incorrectness of the very argument that carried the day in the Court below. Since the Sell-out procedure was

unavailable, Abraham cannot be said to have elected to forego that remedy in favor of an affirmance of the transaction.

Abraham had but one remedy,namely to establish via arbitration that an agreement had been made, and that the Cross Claimants had breached it, and that remedy Abraham sought to enforce. No inference can be drawn from the fact that Abraham did not pursue other remedies that were unavailable to it.

Cross Claimants' sally, that Abraham 's alternative remedy for their breach was to accept the loss and walk away (Brief p. 10) merits no response. As to the quotation from Williston on Contracts, 3d Ed. §1288 (1964), the paragraph quoted begins with the words "In dealings between a stockholder and a customer..." We are not involved in such dealings in this case.

POINT II

THE INTENT EXPRESSED IN THE STIPULATION OF SETTLEMENT WAS TO CONVEY CURRENT OWNERSHIP OF THE CERTIFICATES

Appellees' assertion (Brief p. 12) that the clear intention of the Stipulation of Settlement was to honor and consummate the 1971 oral agreement is absolutely without support in the record on appeal, and indeed, that proposition is directly contradicted by items in the record.

First, the affidavit of Mr. Stuart L Sindell, who attended the settlement negotiations on behalf of Abraham, states that the essence of the settlement was the determination of the amount to be paid by the Cross Claimants to Abraham as damages. After the amount of the damages had been agreed upon, indeed after the essential bargain was struck, Cross Claimants requested assignment of the Certificates (A 61). Abraham agreed to give the Certificates to the Cross Claimants as part of the settlment package (A 62).

Second, Mr. Sindell's uncontradicted account is supported by the wording of the Stipulation of Settlement itself. Sections 1 and 2 of the Stipulation, by their every word make clear that the intention of the parties was nothing more than to setlie Abraham's claim for damages against the Cross Claimants.

> 1. Satnick-Japha, Inc. (Satnick) shall pay to Abraham & Co., Inc. (corporate successor to Abraham & Co., a New York limited partnership) (Abraham) the sum of Twelve Thousand Seven Hundred Thirty-Nine Dollars and Eight Cents ($12,739.08) in full settlement of Abraham's claim in arbitration against Satnick in the amount of Twenty-Six Thousand Three Hundred Ninety Dollars and No Cents ($26,390.00) pending before the National Association of Securities Dealers, Inc. (NASD).
>
> 2. Spingarn & Co., Inc. (Spingarn) shall pay to Abraham the sum of Six Thousand Two Hundred Sixty Dollars and Ninety-Two Cents ($6,260.92) in full settlement of Abraham's claim in

> arbitration against Spingarn in the amount of Twelve Thousand Nine Hundred Forty Dollars and No Cents ($12,940.00) pending before the NASD.

At the settlement negotiations the Cross Claimants continued to contend that no contract had been formed in 1971, and that they had no contractual liability whatsoever to Abraham. That is made clear by Section 11 of the Stipulation which provides as follows:

> It shall be understood that the releases to be exchanged by the parties shall not be construed as an admission of liability or wrongdoing on the part of any of the parties in the pending arbitration proceeding or for any other purpose...

If it had been the intention of the parties in 1973 to record their decision to honor and consummate the 1971 oral agreement, such a document would have been easily written. Abraham had every motivation and incentive at the time of the settlement negotiation to cast the Stipulation in the form of a consummation of the 1971 oral agreement, for that would have been a vindication of its arbitration position. The Stipulation was not so written because the Cross Claimants continued to maintain that there had been no binding 1971 contract, no breach, no wrongdoing on their part, and no prior agreement to consummate. That is the only reasonable inference that can be drawn from the wording of the Stipulation, and that reading is supported by the affidavit of Mr. Sindell,

the only factual account contained in the record.

Cross Claimants point to the fact that the Stipulation does not say Abraham was "selling" the certificates to them. That observation is correct and consistent with what occurred. Cross Claimants requested and received an assignment of the certificates as a further inducement to make a payment of damages. No price tag was put on the certificates. They were thrown in as part of the package.

Viewing the Stipulation as a whole, it evidences no intention to consummate the 1971 oral agreement. The Stipulation is in standard form for the settlement of a dispute without an admission of liability. Indeed, the Stipulation contains no reference to a prior agreement or to the November 1, 1971 date. Cross Claimants' only argument as to the intent of the parties is based upon the single fact that the Certificates were delivered, a fact fully accounted for in Mr. Sindell's affidavit, without any contrary evidence having been submitted by the Cross Claimants. Cross Claimants' assertion that they had an unexpressed intention to honor the 1971 oral agreement is implausable and unsupported in the record.

Thus, the intent expressed in the Stipulation, and supported by the other evidence in the record, was not

to honor the oral agreement, but to settle and discharge Abraham's claims for damages arising thereunder. The cases cited in our principal brief may not be distinguished, for they deal precisely with the legal effect of an agreement to discharge previously existing obligations, and the distinction found by the Court below, as discussed in our previous brief, is without foundation. Abraham's assignment of the Certificates in 1973 was of current ownership only, and Abraham remains entitled to its portion of the settlement fund as the owner of the Certificates on November 1, 1971.

Part III

ABRAHAM HELD BENEFICIAL OWNERSHIP OF THE CERTIFICATES UNTIL 1973

For the purposes of this appeal, we are prepared to agree that had the Cross Claimants accepted delivery of the certificates on November 8, 1971, and made payment in full therefor, they would have been entitled to participate in the distribution of the settlement fund as beneficial owners of the certificates as and from November 1, 1971. Point 1(b) of the Appellees brief (pp. 17-21) goes only to that proposition.

The circumstances at bar, however, are quite different. By the Cross Claimants' account, they disavowed the oral agreement within one hour after the first telephone conversation, they failed to send a confirmation notice,

they asserted that there was no contract in existence (the DK form), they rejected delivery of the certificates on the official NASD rejection form, and they opposed the arbitration brought against them by Abraham for damages.

In short, the parties, dealing at arms length, had developed a bona fide dispute as to whether any contract had been formed, and if so, whether it had been breached or cancelled. There was no longer an open executory contract between the parties, only a chose in action (i.e. an action to establish that a contract had been made and that the Appellees had breached it) opposed by a colorable defense. There being no open contract, the Cross Claimants could claim no beneficial ownership of the certificates, and, indeed, at that time the Cross Claimants were making no claim. Such claim as the Cross Claimants now make can only be based, therefore, on the Stipulation of Settlement. As we have shown, the Stipulation did no more than to fix the damages that Abraham had suffered.

We believe that the best view the Appellees and this Court may take of the Stipulation is that it is the legal product of a dialogue of the parties along the following lines:

Abraham	-	"You bought it"
Satnick-Spingarn	-	"We didn't"
Abraham	-	"You did"
Satnick-Spingarn	-	"We didn't"

[The foregoing is repeated several times]

Abraham and Satnick-Spingarn together- "Lets settle this"

Satnick-Spingarn "We're willing to buy at half-price"

Abraham "O.K., We're willing to sell at half-price"

All together "Its a deal. Let the lawyers write it up".

Even if the Stipulation is thus viewed in the aspect most favorable to Appellees, it is clear that they bought the Certificates in 1973 and not in 1971.

As to Tangorra v. Hagan Investing Corp., 38 App. Div. 2d. 671, 327 N.Y.S.2d 131 (4th Dept. 1971), relied on by the Court below, and misconstrued by Appellees, the point of the case is that, on its facts, the contract date and the delivery date were one and the same, for U.C.C. §8-313(1)(c) defines delivery to have been made to a purchaser when his broker sends him a confirmation and identifies a specific security to the customer's account. That rule has no applicability to the instant facts where Cross Claimants were acting as their own brokers.

POINT IV

ABRAHAM'S POSITION HAS BEEN CONSISTENT THROUGHOUT

The Cross Claimants, who previously asserted that (a) no contractual obligation to purchase the

Certificates was ever assumed, and (b) any contractual obligation or their part was cancelled within one hour of the first oral agreement, now come before this court with the position that (c) they acquired beneficial ownership by reason of the 1971 oral agreement, and (d) their intent in 1973 was to consummate the 1971 oral agreement. It is unseemly and impractical for the Cross Claimants to dwell on Abraham's alleged inconsistances.

Abraham's position has not changed since this matter began. In 1971, Abraham complained that an oral agreement to purchase securities had been made, which agreement was wrongfully and unjustifiably disavowed by the Cross Claimants, for which Abraham sought damages. That the damages sought equaled the purchase price that had been orally agreed to was a furtuitous circumstance attributable to the then belief that the Certificates were valueless. Subsequently, in 1973 Abraham settled its claim for damages and, simultaneously, made an assignment of current ownership of the Certificates to the Cross Claimants.

As to Abrahams' use of the terms "sale" or "sold" in its arbitration claim and proof of claim, we ask the Court to take judicial notice of the fact that in the securities industry the term "sale" is often used to mean a "contract to sell". Thus, one may tell

his broker to "sell 100 XYZ", and after the broker has executed the trade (found a willing buyer and set into motion the confirmation procedure), the broker is likely to report back that he has "sold" the XYZ stock, when in fact only a contract to sell had been formed. This is the general usage in the industry and Abraham was using the terms "sale" and "sold" in this sense in the documents quoted by the Cross Claimants.

Indeed, in their own brief Appellees point out that the Securities Exchange Act of 1934, defines the term "sale" (when used in that act) to include a "contract to sell". It is not, as Appellee's suggest (Brief p. 21) that a contract to sell is a sale but rather that sales are defined (for the purposes of the statute) to include contracts to sell. We need hardly explain the rationale of that definition in the Exchange Act to this Court, and needless to say, since the Exchange Act is not involved in this case, the definition contained there does not apply here.

CONCLUSION

It is respectfully submitted that Abraham sustained a loss with respect to the Interim Certificates that it held on November 1, 1971, and is a member of the class for whose benefit the class action settlement fund was created. It is further submitted that Abraham

was the record and beneficial owner of the Interim Certificates on November 1, 1971 and remained their owner until it assigned them to the Cross Claimants in February of 1973.

Respectfully submitted,

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Service of three ② copies of the within
is admitted this 4TH day of MAY 1977

Jack F. Kleenman